



FTC Non-Compete Clause Rule

Frequently Asked Questions

On May 7, 2024, the Federal Trade Commission (FTC) adopted the Non-Compete Clause Rule (“Rule”), which finalizes a comprehensive ban on new non-competes for nearly all workers. The Rule provides that it is an unfair method of competition—and therefore a violation of Section 5 of the FTC Act—for employers to enter into non-competes with workers.

Q When is the effective date?

A The Rule goes into effect on September 4, 2024. No later than this date, employers must:

- Provide clear and conspicuous notice to workers subject to a prohibited non-compete that the worker’s non-compete clause is not enforceable.
- Stop enforcing existing non-compete clauses with all workers other than “senior executives.” [See Senior Executive FAQ.](#)
- Refrain from entering into new non-compete clauses with workers.

Q Which workers are covered by the Rule?

A The Rule applies to all workers who currently work or who previously worked for an employer, whether paid or unpaid, including employees, independent contractors, externs, interns, volunteers, apprentices, or a sole proprietor who provides a service to a person.¹ However, there are different requirements for “senior executives” as defined by the Rule. [See Senior Executive FAQ.](#)

Q Which businesses are covered by the Rule?

A The Rule covers businesses in nearly all industries, including auto dealerships. Some businesses are outside the FTC’s jurisdiction and therefore not subject to the Rule (e.g., savings and loan institutions, federal credit unions, common carriers, air carriers, and certain non-profits).

Q How is a non-compete clause defined?

A A non-compete clause is a term or condition that prohibits, penalizes or functionally prevents a worker from getting a different job or starting a business after leaving their employment. A non-compete clause may be a contractual term or workplace policy, whether written or oral.² The Rule:

- Prohibits: Terms and conditions expressly saying that a worker cannot get another job, such as with a competitor, or start a business.³
 - Example: A contractual term between a dealership and a salesperson prohibiting the salesperson from working for any dealership within 10 miles for two years after the end of the salesperson’s employment.
- Penalizes: Terms and conditions that require a worker to pay a penalty if they get another job or start a business.⁴
 - Example: A severance arrangement in which the worker is paid only if they refrain from taking a job with a competitor.
 - Example: An agreement that requires a worker to pay back bonus compensation or job training tuition or fees unless they refrain from taking a job at a competing dealership for two years.
- Functionally prevents: Terms and conditions that are not labeled as non-competes but are so restrictive that they effectively prevent a worker from getting a new job or starting a business.⁵

² *Id.*

³ Non-Compete Clause Rule, 89 Fed. Reg. at 38,364.

⁴ *Id.*

⁵ *Id.* at 38,364-38,365.

- Example: A nondisclosure agreement (NDA) that bars a worker from disclosing all information the worker may obtain during their employment at a dealership, including publicly available information. NOTE: NDAs cannot constrain publicly available information.⁶

Q Are there exceptions to this Rule?

- A**
- Existing Agreements with “senior executives”: Existing non-compete agreements with “senior executives” (defined below) are still valid under the Rule. In contrast, for workers other than “senior executives,” dealerships cannot enforce existing non-competes after the effective date of September 4, 2024, and must give these workers notice no later than this date that their non-competes will not be enforced.⁷
 - Non-competes entered into in connection with the bona fide sale of a business.⁸
 - Non-competes enforced where the cause of action accrued before the Rule’s effective date.⁹

Q Who are qualified “senior executives” under the exception?

A “Senior executives” are defined by a two-part test—an earnings test and a job duties test. “Senior executives” are workers:

1. Earning more than \$151,164 total compensation in the preceding year; and
2. Who are in a “policy-making position,” defined as a business entity’s president, chief executive officer, or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.¹⁰ “Policy-making authority” is the final authority to make policy decisions that control significant aspects of a business entity or a common enterprise.¹¹

By way of example, a dealership general manager would likely meet the definition of a “senior executive.” However, it is essential that dealerships work with an attorney who is familiar with their dealership to make assessments regarding “senior executives.”

⁶ *Id.* at 38,365.

⁷ 16 C.F.R. §910.2(a)(2) (2024).

⁸ 16 C.F.R. §910.3(a) (2024).

⁹ 16 C.F.R. §910.3(b) (2024).

¹⁰ 16 C.F.R. §910.1 (2024). See also: 89 Fed. Reg. at 38,418.

¹¹ *Id.*

Q Tell me more about the exemption for non-competes executed as part of the sale of a business.

A The Rule exempts non-competes entered into by a person pursuant to a “bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets” without regard to such person’s percentage ownership interest in said business entity or assets.¹²

Q What can dealerships do to protect workforce investments, trade secrets and confidential information?

A Dealerships have alternatives to non-competes for protecting valuable investments. The Rule does not ban other types of agreements such as NDAs, training or tool repayment provisions, retention bonuses, and other bonus repayment provisions. However, the FTC will apply a functionality test that could invalidate these provisions if it “prohibits” a worker from, “penalizes” a worker for or “functions to prevent” a worker from:

- seeking or accepting work with a different business where such work would begin after the conclusion of the employment; or
- operating a business in the U.S. after the conclusion of the employment.¹³

If a dealership wants to prevent a worker from leaving right after receiving valuable training, tools or bonuses, the dealership can sign the worker to an employment contract with a fixed duration. An employer can establish a term that is long enough for the employer to recoup its human capital investment, without restricting who the worker can work for, or their ability to start a business, after their employment ends. In doing so, the employer makes a commitment to the worker and vice versa.¹⁴

Carefully drafted agreements or terms should enable dealerships to protect confidential information and their investments. Dealerships should work with their attorneys to revise relevant clauses and policies and make sure to implement appropriate procedures on how best to 1) incentivize and train workers, and 2) handle and protect confidential and trade secret information.

¹² 16 C.F.R. §910.3 (2024).

¹³ *Id.* at 38,364.

¹⁴ *Id.* at 38,424 - 38,426.

Q How can dealerships provide the required notice to workers?

A Dealerships will need to determine what workers (current and former) have non-compete clauses and send notice to those workers that those clauses are unenforceable as of September 4, 2024.¹⁵ As a reminder, a dealership does not need to send a notice to “senior executives” who have an existing non-compete agreement. [See Senior Executive FAQ.](#)

The Rule provides safe harbor [model language](#) that satisfies the notice requirement; gives employers several options for providing the notice—on paper, by mail, by email or by text; and exempts employers from the notice requirement where the employer has no record of a street address, email address or mobile telephone number for the worker.¹⁶ Because the model notice language does not identify the recipient as having a non-compete, the dealerships may elect to send a mass communication such as a mass email or text to current and former workers.¹⁷

Model notices in various languages are also [provided by the FTC.](#)

Q Are there any recordkeeping or reporting requirements?

A No. However, dealers may wish to keep copies of notices issued as proof of compliance with the Rule.

Q Does the Rule invalidate an entire existing agreement containing a non-compete clause, or just the non-compete clause itself?

A Only the non-compete clause will be impacted by the Rule.¹⁸

¹⁵ 16 C.F.R. §910.2(b) (2024).

¹⁶ *Id.* See also: 89 Fed. Reg. at 38,436.

¹⁷ 89 Fed. Reg. at 38,436. See also: *Noncompete Clause Rule: A Compliance Guide for Businesses and Small Entities*, FTC, (May 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf (noting that “an all-staff email with the model language meets the requirement. [Businesses] can send an all-staff email even if [they] use noncompetes only for some workers.”)

¹⁸ The FTC highlights this point when it describes the prior rescission requirement in the proposed rule as onerous because of the costs and time spent “modifying” existing employment agreements. 89 Fed. Reg. at 38,402. Additionally, the model language for notification to workers includes the following: “The FTC’s new rule does not affect any other terms or conditions of your employment.”

Q What are the penalties for violating the Rule?

A According to the FTC, violations of the Rule are an “unfair method of competition” that violates Section 5 of the FTC Act.¹⁹ Violations of the FTC Act can result in fines, penalties, and other injunctive relief.

Q What effect does the Rule have on state law?

A The Rule preempts state laws only where they conflict with the final Rule.²⁰ Dealerships residing in a state that has an existing non-compete clause law should work with their attorneys to determine how best to comply.

Q What about the pending litigation?

A There are three pending lawsuits against the FTC seeking a nationwide stay/injunction of the Rule. If there are changes to the Rule’s implementation dates or requirements, NADA will issue an email to notify dealerships.

Q What should dealerships do now?

A Dealerships should prepare as though the Rule will become effective on September 4, 2024, by

- Issuing the required notice regarding existing noncompete clauses prior to this date;
- Stopping enforcement of existing non-compete clauses with all workers other than “senior executives;” and
- Rewriting template contracts to remove non-competes clauses.

Dealerships can retain NDAs, training or bonus repayment provisions, and other similar agreements but should work with an attorney to narrow them as much as practicable.

¹⁹ *Id.* at 38,342.

²⁰ 16 C.F.R. §910.4 (2024).